Filed 1/9/19 In re J.J. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.J., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. COLE M., Defendant and Appellant.	F077603 (Kern Super. Ct. No. JD135503) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Louie L. Vega, Judge.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark L. Nations, County Counsel, and Jennifer Feige, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

J.J. and his siblings were removed from their mother's care. When later notified of the proceedings, alleged father Cole M. (appellant) said he did not want to have anything to do with the case.[1] J.J. and his siblings were eventually returned to mother's care.

Shortly thereafter, the children were again removed from the mother, and a subsequent dependency petition (Welf. & Inst. Code, § 297)[2] was filed with respect to J.J. and his siblings. This time, the Department did not notify appellant of several hearings, including the dispositional hearing. All parties concede this was error.

Later, the Department *did* notify appellant of the section 366.26 hearing. Upon receipt of the notice of the proceedings on the subsequent dependency petition, appellant hired an attorney and sought DNA testing. When DNA testing revealed appellant is J.J.'s father, appellant sought services, visitation and custody. The court denied his requests and terminated his parental rights, observing that J.J. needed stability of placement.

The Department acknowledges error, but argues it was harmless. We disagree and reverse.

FACTS

On November 21, 2015, seven-month-old J.J. was detained while residing with his mother, Sarah J. (Mother). The dependency petition alleged Mother used the drug phencyclidine (PCP) with her uncle, Robert J. Mother began to "tweak out" and subsequently "fell asleep." Mother's other child, four-year-old S.J., said that Robert "poked" S.J.'s vagina while Mother was "asleep." S.J. also said Robert had used a knife to cause a small laceration on S.J.'s forearm.

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[1] Appellant claims he said he did not want anything to do with the case until he had an attorney. Also, he assumed someone else was the child's father.

[2] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

Mother admitted to using methamphetamine " 'off and on every other day' " since June 2015.

Detention Hearing

At the detention hearing on November 30, 2015, Mother said she had never been married. Mother told the court that Joseph F. was J.J.'s father and that no one else could be the father. Joseph F. was not listed on J.J.'s birth certificate,[3] did not reside with Mother before J.J.'s birth and had been in prison since before J.J. was born.

Placement

J.J. and his siblings were placed with maternal grandmother on December 7, 2015.

Jurisdiction/Disposition Hearing

The court held the jurisdiction hearing on February 8, 2016, and an initial dispositional hearing on March 30, 2016. The court continued the initial dispositional hearing so that DNA testing could be performed to determine whether Joseph F. was J.J.'s biological father.

The DNA test indicated there was a "zero" probability Joseph F. was the father of J.J. At a subsequent dispositional hearing on May 10, 2016, Mother testified she was surprised Joseph F. was not J.J.'s father. Mother said that her ex-boyfriend, appellant Cole M., could be the father. Mother also said a man named John P. could "possibly" be the father.

Mother was then asked if either of the two men had any contact with J.J. Mother replied, "Like Cole seen her before and Doody's been around her. Cole, he didn't think that was his baby. He said he was too dark. And Doody is like he hoped it was." Mother was then asked if either of the men supported the child, and Mother testified: "John is like my ex-boyfriend, so he helped me out with like things and stuff like that. But just

[3] Indeed, no father is listed on J.J.'s birth certificate.

helping out because I was his girlfriend not just because he – that was his son or anything like that."

The court again continued the dispositional hearing so that appellant and John P. could be located. The continued dispositional hearing was set for June 7, 2016.

On May 25, 2016, a paralegal named Andrea B. with the Department spoke with appellant on the phone. Andrea introduced herself and "stated the purpose of [her] call." Andrea asked if appellant knew Mother, and he said, " 'Yes.' " Andrea told appellant about the upcoming hearing on June 7, 2016, and appellant said he wanted nothing to do with the case. Two days later, Andrea met with appellant and provided him the following documents: a copy of the notice of hearing for the June 7, 2016, hearing; the dependency petition, and a form JV-505 (Statement Regarding Parentage). Andrea asked if appellant would attend the hearing and appellant responded, " 'No, I will be working.' " Appellant again said he wanted nothing to do with the case. Appellant confirmed his address on Thelma Drive and his phone number.

John P. was also located before the June 7, 2016, hearing. John P. requested DNA testing.

At the June 7, 2016, hearing, the court continued the matter to July 19, pursuant to John P.'s request for DNA testing.

At the July 19, 2016, hearing, the court announced that DNA testing indicated that John. P. is not J.J.'s biological father. The court dismissed John P. from the case. The court then said, "We still have Mr. Cole [M.]" Counsel for the Department responded that she believed appellant would "remain" an alleged Father – he had not appeared in the case and was not requesting counsel. The court subsequently observed that appellant was "merely … an alleged father and has not sought to establish paternity …." The court ruled it would not provide services to appellant.

Children Returned to Mother's Custody But Remain in Grandmother's Home

On November 1, 2016, the court returned the children to Mother's custody, finding that Mother made substantial progress toward alleviating or mitigating the causes for the children's removal. While the children were returned to Mother's custody, they all were living with maternal grandmother.

Second Petition

Mother tested positive for methamphetamine on December 1, 2016; March 1, 2017; and March 31, 2017. Mother also stopped participating in court-ordered mental health counseling and failed to refill her psychotropic medications.

At some point, Mother moved herself and her children out of grandmother's home. On May 1, 2017, Mother submitted paperwork reflecting a change of address.

On May 3, 2017, the Department filed a supplemental dependency petition with respect to J.J. The supplemental petition referenced Mother's failed drug test, failure to continue mental health counseling, and failure to refill her psychotropic medications. The supplemental petition listed Cole M. as J.J.'s biological father.

The children were again placed with maternal grandmother. The grandmother was "committed to a plan of legal guardianship of the children."

On May 9, 2017, the court held a detention hearing on the supplemental petition.

On May 23, 2017, the court held a dispositional hearing. The court terminated Mother's reunification services and set a hearing pursuant to section 366.26.

On June 14, 2017, Mother died. As a result, grandmother wanted a "more permanent plan" than guardianship. The court continued the section 366.26 hearing to December 18, 2017, so that the Department could send a new notice outlining the latest permanent plan.

Unlike several prior hearings, appellant was given notice of the section 366.26, hearing. Upon receiving this notice, appellant hired a lawyer and sought DNA testing. On October 11, 2017, retained counsel for appellant filed a request for an emergency ex

parte hearing and DNA testing to determine paternity of J.J. Appellant averred under oath that he wanted to meet his parental obligations if he was determined to be J.J.'s father. The next day, the court held a hearing and ordered DNA testing.

On November 13, 2017, appellant filed a request to change a court order pursuant to section 388 (the "section 388 petition"). Appellant argued that he was not given proper notice on July 19, 2016; May 1, 2017; or May 23, 2017. Appellant requested the court set aside its findings of proper notice as to those dates and grant him custody and[4] family maintenance services or visitation and family reunification services.

At a hearing on December 7, 2017, appellant's counsel informed the court that the DNA testing showed that appellant is J.J.'s biological father. The court elevated appellant to biological father status and ordered visitation, one hour per week.

On May 10, 2018, when J.J. was three years old, the court held a joint hearing regarding termination of parental rights (§ 366.26) and appellant's request for custody and family maintenance services (or visitation and family reunification services). (§ 388.)

Maternal Grandmother's Testimony

Maternal grandmother testified that she had supervised visits between appellant and J.J. She testified they "really" enjoy their visits together and J.J. is always happy to see appellant. When J.J. sees appellant, he runs to him. Maternal grandmother said appellant was appropriate with J.J. and protective of him. At some of the visits, J.J. would cry for a short period of time because he does not want to leave appellant. Appellant calls J.J. and speaks to him on the phone often. J.J. recognizes appellant's voice and enjoys talking with him. However, J.J. did not ask for appellant between visits.

[4] Appellant's request says custody "or" family maintenance services, but that is presumably a typographical error.

While waiting for the present hearing to begin, maternal grandmother saw appellant holding J.J. and walking him. She said she had "no problem with that" because "[t]hat's his dad."

Maternal grandmother testified J.J. had been in her care for "virtually" his entire life. J.J. has lived in her home for three years, during which time she has been his sole caretaker. J.J.'s three sisters also live there.

After Mother told appellant J.J. might be his, appellant had come by to see J.J. This occurred when J.J. was about a year old.

Appellant's Testimony

Appellant works as a welder and owns his own equipment. He has worked for the fitters union since 2004. He owns a home and has had a stable life for 15 or 16 years.

Appellant met Mother around 2013. Appellant was drinking a lot at the time (though he remained employed) and would eventually join a sober living program. Appellant and Mother were in a sexual relationship for about six or seven months. On at least one occasion, appellant and Mother used cocaine together. They eventually stopped speaking to each other for about seven months, and then had sex one more time. Unbeknownst to appellant, Mother's pregnancy with J.J. resulted from this sexual encounter. Mother did not tell appellant she was pregnant.

When "the social worker" contacted him, she said there were a few other people who could possibly be J.J.'s father. Appellant told her, "[U]ntil I got a lawyer, I didn't want anything to do with the situation until I found out what was going on." Appellant figured that since Mother said there were "two or three other people" that could have been the father, and they only had sex once during the relevant timeframe, chances were that he was not the father. Reflecting back, appellant acknowledges he "should have done something" at that point.

Appellant said he did not know a second man had been excluded as J.J.'s father in July 2016. Appellant said if he had known that, he would have come forward to participate in J.J.'s case at that time.[5]

Appellant described one of his visits with J.J. Appellant brought a ball, which they kicked around together. They also played on a swing. When asked why appellant thought the court should let him have a chance to raise J.J., appellant said:

> "Because I've seen my father – and my mother was a teacher. My dad opened his own heavy equipment [*sic*]. I believe the reason that I was able to find my direction is because I've seen my father do it my whole life. And if he didn't work, it was like that's – you have to work. I was raised everybody worked. And I know that if he lives with me, you know, I'll teach him these things. I'll teach him the things that I came to, you know. I believe if he – he lives with me, I'll – I've learned to have integrity. I've changed the way I see things and my perception of life. And I believe that I can direct him and teach him how to work and how to be ready for life, you know, what is important."

Appellant said he would "absolutely" maintain a relationship with maternal grandmother and J.J.'s siblings.

Proffer Regarding Andrea B.

The Department submitted an offer of proof, which was accepted by all counsel, that Andrea B. did not recall appellant referencing or requesting an attorney.

Court's Ruling

After receiving testimony, the court denied appellant's section 388 petition and terminated his parental rights.

DISCUSSION

Appellant's sole contention is that the denial of his section 388 petition and the termination of his parental rights must be reversed because he received inadequate notice during the dependency proceedings.

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[5] The court sustained an objection to this testimony and it was stricken.

A. Law

"[F]ailure to give notice carries … grave consequences in the dependency court, where parent-child ties may be severed forever." (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 102 (*DeJohn B.*).) Due process requires that alleged fathers "be given notice and " 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.]" (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.)

If, during dependency proceedings, a man is identified as an alleged father, he "shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with this notice." (§ 316.2, subd. (b).) However, notice need not be provided to an alleged parent if they have previously filed a form JV-505 denying parentage and waiving further notice. (Cal. Rules of Court, rule 5.635(b)(3).)

Alleged fathers must be given notice of the detention, jurisdictional, and dispositional hearings. (§§ 290.1, subd. (a)(2); 291, subd. (a)(2).) Alleged fathers must also be given notice when, as here, a supplemental petition is filed. (§ 297, subd. (b).) However, as to review hearings, only presumed fathers or a father receiving services are entitled to notice.[6] (See § 292, subd. (a)(2).)

Courts will not "ignore … lack of notice because the parent was unworthy …." (*DeJohn B.*, *supra*, 84 Cal.App.4th at p. 102.)

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[6] While a presumed father is generally entitled to services, a biological father only receives services "if the court determines that the services will benefit the child." (§ 361.5, subd. (a); see also *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 584.)

B. Analysis

Respondent agrees that required notices were not given to appellant. Even in the lower court proceedings, the Department acknowledged it failed to provide notice for the July 19, 2016; May 1, 2017; and May 23, 2017, hearings. However, the Department argues on appeal the lack of notice "should be addressed by a harmless error analysis."

Some courts have held that failing to attempt notice of certain hearings is structural error requiring automatic reversal. (E.g., *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116; see also *DeJohn B.*, *supra*, 84 Cal.App.4th 100.) Others, including this court, have applied the harmless-beyond-a-reasonable-doubt standard. (E.g., *In re Angela C.* (2002) 99 Cal.App.4th 389, 394–396; *In re Steven H.* (2001) 86 Cal.App.4th 1023, 1033.) We need not resolve this issue because even under the latter standard – which is more favorable to the Department – we must reverse.

The Department essentially argues the lack of notice was harmless beyond a reasonable doubt because even if appellant had received notice, he would not have been successful in the proceedings (i.e., in seeking *Kelsey S.* status, custody, etc.).[7] The Department points to appellant's purportedly insubstantial relationship with J.J., and initial lack of interest in the case.

Appellant's initial lack of interest in the case is unfortunate. But the fact remains that he was entitled to change his mind during the proceedings, and decide to seek elevated status, services, visitation and eventually custody. Indeed, appellant *did* change his mind, hired an attorney, and vigorously sought such relief. However, he did so very late in the proceedings – after a section 366.26 hearing had already been set. His prospects of prevailing at that late stage were dim. Perhaps he would have waited that long to change his mind even if he had been properly given notice along the way. If so, the lack of notice would be harmless. But perhaps appellant would have sought

[7] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816.

elevation, services, visitation and custody much sooner had he been given proper notice. If so, the lack of notice would not have been harmless, as appellant would have likely begun visitation sooner and had longer to develop his bond with J.J. We simply cannot say with certainty beyond a reasonable doubt that appellant would have fared no better in his current quest for services, a longer span of visitation, and ultimately custody had he been properly kept apprised of the hearings on the subsequent petition.

The Department argues that granting appellant's section 388 petition was not in J.J.'s best interests. The Department cites appellant's limited relationship with J.J., and the juvenile court's ruling, which emphasized the need for stability for J.J. We understand that any reversal in a dependency case can threaten stability of placement for a child. But a minor's interest in stability does not trump a parent's right to notice. (*DeJohn B., supra*, 84 Cal.App.4th at p. 102.)

DISPOSITION

The order terminating parental rights as to J.J., the order denying appellant's section 388 petition, the July 19, 2016, dispositional orders[8] and subsequent orders pertaining to J.J., are reversed. The matter is remanded for a new dispositional hearing as to J.J. On remand, the court shall reconsider appellant's requests for services, visitation, etc. in the section 388 petition in accordance with the views expressed in this opinion.

[8] Appellant does not request reversal of orders prior to the July 19, 2016, dispositional orders.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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DETJEN, J.

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PEÑA, J.